Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
In Local Telecommunications Markets	)	
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
To Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed	)	
To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
To Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
And Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF GENERAL COMMUNICATION, INC.

By its undersigned attorneys, General Communication, Inc. ("GCI"), hereby submits comments in response to the Notice of Inquiry issued by the Commission in the captioned proceeding.[1] GCI's own experience in securing rights-of-way for the installation of competitive

[1] Promotion of Competitive Networks In Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules To Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or

(continued...)

telecommunications facilities underscores the need for Commission action with respect to the management of public rights-of-way, including compensation practices, as it is related to the development of facilities-based competition. Specifically, more clearly defined processes and the elimination of local and state regulations that are not competitively neutral will help eliminate some impediments to the development of facilities-based competition, which have been raised or perpetuated by state and local governments.

OVERVIEW

GCI's experience with rights-of-way management and compensation issues may be illustrated using three examples. In the State of Washington, GCI pursued a permit to install a submarine cable landing for over fourteen months before it secured the necessary authorization – once the vessel was already on site to install the approved cable. Related to the same project, GCI encountered difficulties in acquiring access to a right-of-way from the cable landing point to the terminal station in Snohomish County, related to franchise permit requirements and cable placement. Finally, in Alaska, GCI has identified and notified the state of specific statutes and regulations that fail to satisfy the nondiscrimination and competitively neutral requirements of rights-of-way management mandated under Section 253(c) of the Communications Act of 1934, as amended (the "Act"). In each case, GCI believes that state policies must be developed or

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Excessive Taxes And Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (rel. July 7, 1999).

amended to satisfy the statutory requirement that compensation for and management of rights-of-way be nondiscriminatory and competitively neutral.

1. State of Washington

In September 1997, GCI, through its permit agent, contacted the Washington State Department of Natural Resources ("DNR") about obtaining a right-of-way permit to use submerged lands for the construction of a submarine cable landing. The permit application was submitted in early November 1997. GCI did not obtain a permit until mid- December 1998, over fourteen months after its initial contact with the Washington DNR. This process took an extraordinarily long time to complete, far longer than a reasonable and rational business plan would anticipate. In fact, GCI did not have its permit in hand until the vessel had arrived on the shore, ready to finish laying the cable, which at this point extended over 2,300 miles and was planned to connect Anchorage, Fairbanks, and Juneau to Seattle.

Adding to the difficulty in securing the necessary permit was the indefinite process for obtaining permit authority and the unsubstantiated and, in GCI's opinion, rather high compensation rate. GCI worked with one staff person at Washington DNR for over ten months to obtain the permit, but after it became apparent that these efforts had resulted in little substantive progress toward securing the permit, GCI had to pursue alternative channels within the DNR. In addition, a significant impediment to finalizing the permit both in the midst of this process and during its final stages was the fee to be assessed for the land values. Washington DNR appeared to have no documented process for determining land values and proposed a fee structure based on a percentage of comparable upland values. The Washington DNR estimate of

upland land values, however, exceeded GCI's appraisal by 600 percent. The final price was achieved through negotiation, and GCI does not believe that the amount reflects "fair and reasonable compensation" as required by Section 253(c) of the Act. For obvious reasons, however, GCI could not afford to abandon the permit process.

This experience illustrates the fact that states must develop clear processes for granting access to rights-of-way that should include rate development methodologies. Without this information, carriers will expend needless time and effort pursuing permits, including engaging in blind compensation negotiations with the authorizing entity. In a situation where no alternative right-of-way is available, the possibility for discriminatory compensation structures that are not competitively neutral is great.

2. **Snohomish County, Washington**

GCI also faced delays and administrative uncertainty associated with its attempt to install its submarine cable up to and at the terminal station in Snohomish County. The fiber terminal station is situated 2.7 miles from the point where the submarine cable reaches shore. In two areas – the mandated placement of the cable and the requirement for a franchise permit – county officials imposed costly requirements upon GCI that could not be traced to any delineated process or regulation. These requirements were inconsistent with GCI's commissioned engineering surveys and with previous instructions provided by the county.

With regard to the placement of the cable, the county insisted that the facility be placed in the center of the road, even though there was room along the berm to place the cable. Requiring GCI to lay the cable down the center of the road caused unsafe traffic conditions and raised the

possibility of road settling and interference with water and sewer facilities. Having required GCI to construct in the road, GCI had to bury conduit seven feet below grade, backfill the entire trench with cement slurry, and then resurface the entire road. GCI estimates that these otherwise needless requirements, given the alternative of running the cable alongside the road, tripled the expense of this project. GCI was never given any rational by the county for the requirement to utilize the right-of-way in a more disruptive and expensive manner than proposed by GCI.

The county's approach to the actual permit requirements was similarly vague. At the beginning of the permitting process, county officials stated that a franchise permit would not be required for use of the right-of-way. Several months later, however, and after the right-of-way permit had been issued, the county "reversed" its earlier statement and required a franchise permit, which takes an average of six months to obtain. GCI still is not satisfied that the franchise permit actually is required, but again, when no suitably expeditious alternative is available, the carrier is forced to accede to the governing entity's demands, even when they seem unreasonable and unsupported by law, regulation, or policy.

3. Alaska – Statutes and Regulations

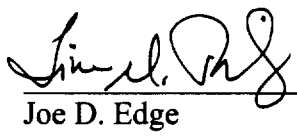
GCI has also determined that certain Alaska statutes and regulations fail to satisfy the statutory requirement that rights-of-way management be nondiscriminatory and competitively neutral. First, certain provisions of the Alaska code discriminate against for-profit telecommunications providers in favor of non-profit telecommunications providers. These provisions, described in more detail in the attached letter addressed to the Lieutenant Governor of Alaska, permit a non-profit provider to pay less that a for-profit provider for use of the same

rights-of-way unless a determination is made that it is in the state's best interest to assess all providers, regardless of their profit status, based on the appraised market value of the property.

Second, the Alaska Administrative Code imposes user fees for surface use of land (rights-of-way) that are not competitively neutral among technologies. Providers using fiber optic facilities are assessed an annual fee equal to the yearly fair market rental value of the land pursuant to an appraisal commissioned at the applicant's expense and subject to adjustment at five-year intervals. Providers using any other technology are assessed an annual fee of $100 per acre, but no less than $200. This policy on its face assesses compensation for rights-of-way use that is not competitively neutral, contrary to Section 253(c) of the Act. These regulations also are explained in more detail in the attached letter. GCI hopes that by bringing these statutory and regulatory provisions to the attention of Alaska officials will lead to appropriate changes in the law to make it consistent with federal law.

Based on the foregoing, GCI urges the Commission to act quickly and decisively with respect to requests for preemption of state or local statutes, regulations, policies, or actions with respect to management of and compensation for rights-of-way that are discriminatory and not competitively neutral. In addition, GCI proposes that the Commission, in conjunction with the Local and State Government Advisory Committee, provide guidance to states and local governments regarding rights-of-way policies that will promote and not impede the deployment of telecommunications services.

Respectfully submitted,



Joe D. Edge
Tina M. Pidgeon
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 842-8800
(202) 842-8465 FAX

Attorneys for
GENERAL COMMUNICATION, INC.

Dated: October 12, 1999

October 11, 1999

Honorable Fran Ulmer, Lieutenant Governor
State of Alaska
P.O. Box 110015
Juneau, Alaska 99811

Subject: FCC Notice of Inquiry
Fiber Optic Facilities
Regulations & Charges for State and
Local Government Rights-of-Way

Dear Lieutenant Governor Ulmer:

Thank you for the opportunity to comment on our perspective of how state and local governments are charging, or should charge, for the use of rights-of-way on state and local government lands. GCI has concerns with the state's statutory and regulatory rights-of-way policies. While this is the first communication with your office on these issues, GCI has previously made its position known in correspondence with the Department of Natural Resources.

By copy of this letter to the Office of the Secretary, Federal Communications Commission, GCI is also submitting its comments for the proposed rule-making and notice of inquiry (FCC Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees, paragraphs 70 through 80). Our intent is to provide comments regarding our perception of the statutory and regulatory requirements affecting issuance of rights-of-way across state lands.

Our concerns relate to the State of Alaska Department of Natural Resources's current statutes and regulations as they apply to fiber optics rights-of-way and telecommunications providers. First, as written, the provisions of AS 38.05.850(b) and AS 38.05.810(f) discriminate between "for-profit" and "non-profit" telecommunications providers. Secondly, as written the regulations are not competitively neutral between telecommunications technologies. Lastly, as applied to rights-of-way, the state's policy is inconsistent with established appraisal policy.

1. As written, the provisions of AS 38.05.850(b) and AS 38.05.810(f) discriminate between "for-profit" and "non-profit" telecommunications providers.

5151 Fairbanks Street • Anchorage, Alaska 99503 • 907/786-9260
Cable services provided by GCI Cable, Inc.

Under the provisions of AS 38.05.850(b) the commissioner "shall" waive the fee for rights-of-way issued to non-profit providers, and, according to AS 38.05.810(f), the commissioner "shall" lease state land for less than the appraised value to non-profit providers. Both provisions have discretionary authority based on a best interest finding. Private for-profit telecommunications providers are not eligible for the waiver.

As it now stands, a for-profit and a non-profit telecommunications provider, side by side in the same right-of-way, will pay different rates unless the Commissioner makes a best interest finding to charge the non-profit provider fair market value rental. Absent a commissioner's finding that it is in the state's best interest to charge fees based on appraised fair market value to all telecommunications providers, the statutes impermissibly discriminates between for-profit and non-profit telecommunications providers.

Currently, non-profit member owned cooperative associations using either traditional or fiber optic technology are utilizing rights-of-way for which the fees have been waived in accordance with the statute. Even if the discretionary feature of the statutory scheme can be resolved by an across the board best interest finding mandating fair market value payments for all providers, those rights-of-way issued since the enactment of the Telecommunications Act in 1996 do not meet the requirements.

Although there may have been a time when special treatment of non-profit cooperatives was appropriate, today's reality is that non-profits are competing with for-profit corporations in may areas, including long distance and Internet services. Non-profit providers have even installed fiber optic systems and, after installation, then leased capacity to for-profit enterprises competing with other for-profit corporations.

The existing policy is not fair and nondiscriminatory to all telecommunications providers of comparable services. A fair and nondiscriminatory policy would treat all providers equally.

2. As written, the regulations are not competitively neutral between telecommunications technologies.

Title 11 of the Alaska Administrative Code, Chapter 5, Section 10 governs the Department of Natural Resources user fees for surface use of lands administered by the Department. Subsection (e) (11) (C) specifies "for a fiber-optic telecommunications system, an annual fee equal to the yearly fair market rental value of the land, as determined by an appraisal at the applicant's expense, and subject to adjustment at five-year intervals after a reappraisal at the applicant's expense...." However, all other forms of telecommunications facilities are subject to different regulatory provisions:

(A) for a non-exclusive use other than a fiber optic telecommunications system as provided in (C) of this paragraph, an annual fee of $100 per acre, but no less than $200;

(B) for an exclusive use other than a fiber-optic telecommunications system as provided in (C) of this paragraph, an annual fee equal to the director's estimate of the yearly fair market rental value;

Consequently, local exchange carriers using traditional wire technology are charged different rates for non-exclusive use ($100 per acre versus the appraised fair market value). A different methodology to determine fees also applies to exclusive use rights-of-way (director's estimate for non-fiber optic versus appraisal and five year reappraisals for fiber optic systems.)

As noted in the proposed rule making, the competition sought by the Telecommunications Act depends in part on the change in technology between the incumbent traditional wire based facilities and recent technology being installed by the competitive local exchange carriers. The discrimination between the existing wire facilities and fiber optic facilities under 11 AAC 05.010 (e)(11) is contrary to the stated purposes of the Telecommunications Act.

3. As applied to fiber optics rights-of way, the state's policy is inconsistent with appraisal practice and sound public policy.

The stated appraisal policy adopted under 11 AAC 05.010 in "The Special Appraisal Instructions for Fiber Optic Systems" mandates appraising each right of way at 100 percent of the market rental value of the land, irrespective of any shared use. That policy is inconsistent with appraisal practice and sound public policy. Section 5 of the special instructions pertaining to methodology specifies that: "The appraiser will appraise each right-of-way at 100 percent of the market rental value of the land and will disregard the effect on value, if any, of shared right-of-way." Unless the easement rights granted equate to the fee simple interest, the impact on the state and the uses granted to the permittee do not equate to 100%. An outright mandate of 100 percent of the market rental value of the land is not an appropriate, fair or just rental.

Granting of an easement only allows those uses identified in the easement and any incidental rights authorized by law. Issuance of an easement, either non-exclusive or exclusive, leaves an underlying fee simple interest in the State of Alaska. That underlying fee simple interest may be subject to additional rights-of-way in the case of a non-exclusive easement, or may be subject to use by the state for purposes not inconsistent with the grant of right-of-way.

In the case of a non-exclusive easement, the state retains the right to grant rights-of-way to multiple users. Vis a vis one another, multiple users are subject to the priority rights established by time of installation of the various uses. Subsequent users must not impair the rights of existing users and must avoid impacting those existing uses. As a result of subsequent grants of rights-of-way, an existing user is likely to experience increased operational costs, risks of loss due to the activities of the subsequent users, and reduced opportunity to expand or replace existing facilities. Furthermore, it is the Department of Natural Resources' policy that subsequent users obtain letters of non-objection from prior existing interests as part of the permitting process. Frequently the prior existing interests place conditions on the issuance of the letters of non-objection that often impact a subsequent user's ability to use the right-of-way. Disregarding the effects of shared rights-of-way does not comport with standard appraisal practice, nor is it an appropriate charge to the user.

Lastly sound public policy should encourage multiple use or joint usage of rights-of-way. Requiring full value for a shared use along with the attendant risks does not encourage multiple or joint use.

Recommendations:

To be competitive in the global economy, Alaska must develop its telecommunications infrastructure. GCI strongly supports the development of statewide policy that promotes such development. Our preference is an overall policy that encourages development by limiting its fees to reimbursement for administrative costs as other states and communities have done. On the other hand, GCI understands the state's fiscal issues and the need for a reasonable return on state resources. A fair and reasonable approach to compensation for use of the state's resources would be the adoption of a fair market value standard for rights of way across State lands. That approach, however, must apply equally to all telecommunications providers, whether traditional wire based or fiber optic, for-profit or non-profit.

GCI acknowledges the traditional thinking behind the State's policy that allowed disposal or usage of state lands at less than fair market value (or waived payment altogether) to non-profit cooperative associations providing telephone or electric transmission and distribution services, but utility deregulation and the Telecommunications Act of 1996, requires the elimination of waivers for all entities.

Current state practice is to charge an annual rental, which typically comes from operating funds. Often the capital funding source will not authorize payment of operational charges, but will participate in the funding of capital project acquisition costs. In an effort to provide alternatives for payment of the fees for telecommunications rights-of-way, GCI endorses a program that allows the option of either annual payments or a lump sum payment for the improvement's life cycle for an extended period of time, such as 25 years. Although a lump sum payment will not allow for the periodic increase in the annual rents as is currently done, it may have significant capital funding or operational cost benefits to the users while providing the state the use of a larger initial sum of funds.

Sincerely,

William R. Snell
Vice President & General Manager
Cable & Entertainment

cc: Commissioner John Shivley